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Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

RAMON LOPEZ,

*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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29 pp

## QUESTIONS PRESENTED

1. In a federal criminal drug prosecution, should a rule of automatic admissibility be the governing principle regarding whether the Government should be allowed to introduce a judgment of conviction of a prior drug crime, under the guise of proving criminal intent and the absence of accident or mistake, where the defense does not make intent an issue truly in dispute?

2. Can a trial court permit the Government to introduce a judgment of conviction of a prior drug crime, pursuant to Federal Rule of Evidence 404(b), and then, pursuant to Federal Rule of Evidence 403, bar a criminal defendant from introducing the notice of appeal of that very judgment for the purpose of informing the jury that the prior conviction is on appeal, where the defense is acting pursuant to and as expressly authorized by Federal Rule of Evidence 803(22)?

3. Should the defendant receive a new trial where the Government elicited significant incriminating hearsay testimony from two witnesses relating what a non-testifying government informant purportedly stated concerning the defendant, where one statement involved both hearsay within hearsay and was admitted under the guise of coconspirator hearsay with a government agent; where the second statement was admitted under the guise of a law enforcement officer expressing his basis for initiating an investigation of the defendant; and where the Government failed to meet its burden of justifying admissibility?

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Ramon Lopez, petitions this court to review the judgment and opinion of the United States Court Of Appeals, Eleventh Circuit in this case.

## OPINION BELOW

The full opinion of the court of appeals is unpublished. That opinion is reproduced in its entirety in the appendix to this petition. The decision of the court of appeals, itself, is published in a table contained at 53 F.3d 1285.

## BASIS FOR JURISDICTION

The opinion of the lower appellate court was filed on April 24, 1995.

This Court has jurisdiction to review a decision of a United States Court of Appeals pursuant to 28 United States Code Section 1254.

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## RULE PROVISIONS INVOLVED

### Question One

Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, . . . , is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of . . . , intent, . . . , or absence of mistake or accident, * * *

### Question Two

Federal Rule of Evidence 803 and specifically Rule 803(22) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial . . . , adjudging a person guilty of a crime punishable by . . . imprisonment in excess of one year, to prove any fact essential to sustain the judgment,. . . . The pendency of an appeal may be shown but does not affect admissibility.

**Question Three**

Federal Rule of Evidence 802 provides:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Federal Rule of Evidence 805 provides:

> Hearsay within Hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

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## STATEMENT OF THE CASE

Petitioner Ramon Lopez was tried on a two-count indictment, charging him with the crimes of possession of cocaine with intent to distribute it, 21 U.S.C. § 841(a)(1), and conspiracy to commit that crime, 21 U.S.C. § 846.

Petitioner Lopez was tried with two other codefendants, Nancy Garcia and Javier Orosco-Zapata. Three of the originally-charged codefendants, Gerardo Machado, Redelio Garcia, and Luz Mary Del Pino each pled guilty. One of those three, i.e., Mr. Machado, testified for the Government during Petitioner Lopez' jury trial, while two of those former codefendants testified for the defense.

On the third day of deliberations, the jury was given a modified Allen charge. Petitioner Lopez' codefendants, Ms. Garcia and Mr. Orosco-Zapata, were acquitted at the conclusion of this trial. Only Petitioner Lopez was convicted by the jury, his conviction being for both charged crimes. Petitioner Lopez was sentenced to life imprisonment.

The evidence upon which Petitioner Lopez' conviction rests – the backdrop for the legal issues presented in this petition – is the following:[1]

**A. The Testimony Of Gerardo Machado.**

The primary Government witness at this trial was Gerardo Machado. At an unspecified time approximately April of 1991, Mr. Machado received a call from Lori Bagglio. This woman was the daughter of Lenny Bagglio. Mr. Lenny Bagglio acted as a confidential informant in

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[1] When relating the factual basis for his conviction, Petitioner Lopez is excluding most of the testimony elicited in the Government's unsuccessful effort to convict Petitioner Lopez' two acquitted codefendants. Most of that testimony was irrelevant to Petitioner Lopez' conviction.

this case. Lori Bagglio told Mr. Machado that Petitioner Lopez told her father, Lenny Bagglio, that he, Lopez, wanted to find a pilot, who would fly to Colombia to get some cocaine. Lopez and Lenny Bagglio came to an agreement in which Lenny Bagglio was to obtain a pilot for the flight to Colombia.

At a later date and after the cocaine arrived in the United States, Mr. Lopez came to Mr. Machado's home and discussed the fact that he was unable to obtain the cocaine, because he, Lopez, was unable to pay the $400,000.00 transportation fee that was to be paid to the pilot in advance of the delivery of the cocaine. Lopez stated that he, Lopez, had already provided $50,000.00 to Lenny to rent the plane used to bring the cocaine to Miami.

The next day, Machado met with Mr. Lopez and a Colombian named Alberto. Lopez wanted Machado to organize everything, because Lopez believed that he was getting in trouble and because Lopez was already out on bond on a pending drug case for which he had to wear a monitoring device. Machado told Alberto that he, Machado, would do all of the negotiating with the pilot to obtain the cocaine.

Mr. Machado testified that Mr. Lopez and another person named Jorge were present with him at one time while he was negotiating for the cocaine. At that time, Mr. Lopez talked to Lenny Bagglio, using a cellular telephone. The conversation with Lenny was in English, because Lenny could not speak Spanish. A tape recording of that conversation was introduced into evidence.

At Lopez' instruction, Machado and the person named Jorge had a meeting with Lenny Bagglio at a McDonald's restaurant to discuss picking up the cocaine. After that meeting, Machado and Jorge met Mr. Lopez at a local park and told Lopez that Lenny Bagglio claimed to have seen the cocaine. Machado told Lopez that Lenny made such a commotion at the restaurant that Machado became scared and left. Petitioner Lopez told Machado that he wanted to investigate further, because these persons might be police officers.

After the meeting at the park, Machado continued telephone negotiations with Lenny Bagglio and the pilot, Ralph. Machado attempted to have Ralph turn over part of the cocaine in exchange for a part of the money owed to him. Lopez had told Machado that there was no money to make an advance payment.

Machado also carried on discussions with Alberto, who had come from Colombia to take control of that cocaine. Lopez was only in charge of the transportation of the cocaine.

Ralph requested that he, Ralph, talk with Lopez. Machado was present when Lopez talked to Ralph over a pay telephone. A tape recording of that telephone conversation was introduced into evidence. This conversation was conducted in the Spanish language. Mr. Machado maintained that this conversation used code words, which Machado defined for the jury and which were utilized in case that conversation was being recorded.

Because Lopez stated that Lopez only had $60,000.00 to use to obtain the cocaine, Machado contacted a drug dealer in New York to obtain additional funds. Machado

sent his wife to New York and she brought back $160,000.00.

Now possessing a total of $220,000.00 – most of which was obtained through Machado's efforts – , Machado went with Lopez to Lenny Bagglio's home. Machado negotiated delivery of 200 kilos of cocaine in exchange for the money that they now had.

The next day, Machado brought the cash to a gas station. Machado stole some of that money for himself. Machado met with Lopez and informed him of the status of what was going on. Thereafter, at Lopez' and Lenny's instructions, Machado picked up a car, the trunk of which contained several bales of cocaine. Next, Machado called Alberto, who was either the owner or working for the owner of that cocaine. Machado decided to steal one of the bales of cocaine, which contained forty (40) kilos of cocaine, and left it at the home of one of his neighbors, the Garcias.

Machado drove away to deliver the 160 kilos of cocaine remaining in the car. At this point, Machado was arrested. At the scene of his arrest, Machado decided to cooperate with the Government by permitting a controlled delivery of that cocaine. Machado called Alberto and received instructions to deliver the cocaine to a woman at a parking lot. Machado and Special Customs Service Agent Grimal carried out this delivery. The woman, to whom they delivered the cocaine, was Ms. Del Pino. That woman was followed and arrested later with her paramour, Mr. Orosco-Zapata.

**B. Additional Evidence Elicited At Trial.**

Paul Grimal was a Special Agent for the Customs Service, who was involved in this case. Lenny Bagglio approached the Government. The Government obtained $50,000.00 from Bagglio, which it used to secure a plane and a pilot. This plane, containing only persons working for the Government, flew to Colombia and picked up 300 kilos of cocaine, which ultimately were flown into Florida by the undercover agents on April 5, 1991. One attempt was made to deliver this cocaine. That surveilled effort at delivery failed. Agent Grimal was able to see Lenny meet with Mr. Machado and another unidentified male, who was not Mr. Lopez. Agent Grimal reviewed the two recordings that were made by Lenny and Ralph, identifying one of the voices as being that of Mr. Lopez.[2] The agents were not present, when those recordings were made by the informants, because the nature of those negotiations did not permit the Government officers to know where or when the calls would be made. Agent Grimal participated in the final controlled delivery of 200 kilos of cocaine to Machado, the arrest of Machado and the subsequent controlled delivery to Ms. Del Pino.

Agent Grimal was unable to testify that either he or another federal officer saw Mr. Lopez during any surveillance or arrest, while this investigation was being conducted.

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[2] Agent Grimal testified that he was able to identify Petitioner Lopez' voice, because he had arrested Petitioner Lopez in June of 1990 and had talked to Lopez at that time.

The Government introduced a judgment of conviction that was obtained against Mr. Lopez regarding a conspiracy to possess five (5) kilos of cocaine in June of 1990. That crime was committed almost one year before the events being litigated at this trial.

Agent Grimal also testified that the agents attempted to arrest Petitioner Lopez on April 16th, but were unable to locate Lopez at the place Lopez was supposed to be pursuant to Lopez' bond conditions. Finally, Mr. Lopez was arrested on May 14, 1991 while he was visiting his girlfriend.

Customs Service Special Agent Scott Davis testified that he was the one who met with informant Lenny Bagglio and initiated this investigation of Mr. Lopez based on what Lenny told him. Agent Scott described how the Government used Lenny to obtain the 300 kilos of cocaine from Colombia.

Ms. Del Pino testified that she dealt with Alberto and another person. Ms. Del Pino admitted that she picked up the cocaine at Alberto's direction. Ms. Del Pino testified that she had never seen Petitioner Lopez before and never heard either Alberto or the other gentleman mention Mr. Lopez' name.

Neither Lenny Bagglio nor Lori Bagglio nor Ralph testified at the trial of Petitioner Lopez.

The Government did not conduct a voice analysis to compare Mr. Lopez' voice to the voice heard on the two tape recorded cellular telephone calls.

## REASONS FOR GRANTING THE PETITION

The essence of the Government's proof of guilt against Petitioner Lopez turned on the credibility of one witness, Mr. Machado. The quality of the Government's proof highlights several evidentiary issues that warrant review by this Court. While this Court might find any one of these issues worthy of review, it is submitted that these issues intertwine in terms of their combined prejudicial effect. For that reason, Petitioner Lopez requests this Court to give additional consideration to addressing all of the evidentiary rulings, which are presented to this Court for review.

### Question One

Petitioner Lopez repeatedly objected to the admission of a single judgment of conviction that informed the jury that Mr. Lopez was previously convicted by another jury of two drug crimes related to the possession of five kilos of cocaine. Defense counsel based his argument on the reasoning contained in the decision *United States v. Schackelford*, 738 F.2d 776 (7th Cir. 1984). Defense counsel asserted that such evidence should not be admitted unless and until the Government has reason to believe that the defense was raising criminal intent as an issue.

The trial judge admitted this evidence of a collateral crime on the basis that the law in the United States Court of Appeals for the Eleventh Circuit mandated admission, because a not-guilty plea from a defendant places intent in issue. The trial judge ruled that this evidence of the commission of the two interrelated prior drug crimes by the defendant served to rebut any inference that the

defendant committed the pending charges by either accident or mistake. The trial judge gave a mid-trial instruction to the jury that it might consider those acts in deciding whether Petitioner Lopez did the acts charged in the pending prosecution "willfully and not through accident or mistake."

During closing argument, defense counsel asserted to the jury that this was the most difficult evidence to respond to of all of the evidence that was admitted against Mr. Lopez.

In drug crime prosecutions, the United States Court of Appeals for the Eleventh Circuit – as do other circuits – has a rule of automatic admissibility of the commission of other drug crimes. The rationale employed by the Eleventh Circuit is the following: A defendant automatically places in issue his intent to commit a drug crime every time that he pleads not guilty. Consequently, the Government is allowed to introduce proof of the commission of any prior drug crime to rebut any inference that the defendant acted by mistake or accident. When determining admissibility on the balancing test of Federal Rule of Evidence 403, the Government's side of the scale contains a "heavy burden" of proving intent. Practically speaking, when this law is put into operation, evidence of the commission of a prior drug crime is automatically admitted against a criminal defendant.[3] *E.g., United States v.*

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[3] Counsel neither knows nor has heard of any federal criminal case in which the trial judge has excluded such evidence in a drug prosecution. The Solicitor General of the United States is best able to provide this Court with an honest presentation of the national statistical evidence in recent years either support-

*Pessefall*, 27 F.3d 511 at 516 (11th Cir. 1994); *United States v. Hogan*, 986 F.2d 1364 at 1373-1374 (11th Cir. 1993); *United States v. Jones*, 913 F.2d 1552 at 1565-1566 (11th Cir. 1990).

There is a conflict among lower federal circuit courts of appeal on the proper legal analysis to use under Federal Rule of Evidence 404(b), when the issue of intent is no more than technically an issue because there is no true dispute on the intent element for which the collateral crime is being introduced. *Compare United States v. Schackelford*, 738 F.2d 776 (7th Cir. 1984); *United States v. Halper*, 590 F.2d 422, 432 (2d Cir. 1978). Two major treatises discuss the various approaches to this matter. 2 *Weinstein's Evidence* § 404[09] at 404-56 through 404-61 (Matthew Bender 1995); 12 Fed. Proc. L. Ed. *Evidence* § 33:183 (1988).

To date, this Court's major venture into the domain of Federal Rule of Evidence 404(b) is *Huddleston v. United States*, 485 U.S. 681 (1988). Interestingly, this Court observed: "Extrinsic acts evidence may be critical to the establishment of the truth as to a *disputed* issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." *Id.* 485 U.S. at 685. As a counterweight, this Court expressly stated that it "shared [the defense's] concern that unduly prejudicial evidence might be introduced under Rule 404(b)." *Id.* 485 U.S. at 691.

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ing or disproving the proposition that automatic admissibility is the reality.

In *Estelle v. McGuire,* 502 U.S. 62 (1991), this Court addressed the admissibility of collateral crime evidence in the context of a federal constitutional analysis undertaken during a federal habeas corpus review of a state court criminal conviction. Although noting that a defense of accident was not presented at the trial, this Court expressly observed that the collateral crime evidence introduced by the state prosecutors eliminated the possibility of accident, "especially in light of the fact that McGuire had claimed prior to trial that Tori had injured herself by falling from the couch." *Id.* 502 U.S. at ___, 112 S.Ct. at 481. This Court limited its analysis in *McGuire* to the issue of relevance of the extrinsic evidence to the pending prosecution and did not venture into the full analysis required under the federal rules of evidence for a federal criminal prosecution.

That this question is worthy of review is established by the fact that this Court previously granted review on this issue in *Hadley v. United States,* United States Supreme Court case number 91-6646. For reasons only known by this Court, this Court dismissed that writ of certiorari as improvidently granted, after oral argument was held. *Hadley v. United States,* ___ U.S. ___, 113 S.Ct. 486 (1992); 51 Criminal Law Reporter 2005 (speculating as to basis for dismissal).

In this case, there was absolutely no issue before the jury whether Mr. Lopez acted unintentionally to obtain the cocaine. Rather, the *only* issue was whether Petitioner Lopez was the person whose voice appeared on tape and who Mr. Machado claimed was one of the persons with whom he, Machado, dealt. Any contention that the prior-crime evidence was probative of a real issue at this trial is frivolous. On these facts as a matter of law, the probative

value of this evidence was outweighed by its prejudicial impact. That is especially so where the jury trying Petitioner Lopez was informed that another fact finder had already found him guilty of a drug crime. This evidence was really admitted to establish that Mr. Lopez was guilty, because Lopez had committed drug crimes once before. This proof of propensity to commit drug crimes should have been excluded as a matter of law.

Because this issue rears its head in a voluminous number of federal criminal prosecutions and because the federal circuit courts of appeal differ significantly in the proper analysis to use, this Court should intercede and provide definitive guidance to all of the lower courts.

**Question Two**

In this case, the Government introduced a judgment of conviction for a prior drug crime to prove the absence of accident or mistake in the commission of the drug crime being tried. Fed. R. Evid. 404(b).

Defense counsel attempted to cross-examine the witness through whom the Government introduced the judgment. At that time, the witness stated that he did not know that Petitioner Lopez was appealing this judgment outside of the fact that defense counsel stated in the pending question that there was an appeal.

Later in the trial, defense counsel attempted to introduce a certified copy of the notice of appeal of that

judgment of conviction.[4] The prosecution opposed admissibility of this document, arguing that the pendency of an appeal does not undo the conviction and that, therefore, the notice of appeal is irrelevant. The trial judge sustained the Government's objection, taking the position that the jury may not understand the meaning of the notice of appeal and that, therefore, the possibility of confusion outweighed any probative value.

A certified copy of a document constituting a final judgment of conviction is admissible in evidence. Fed. R. Evid. 803(22). Consequently, the Government could introduce the judgment of conviction as proof of a collateral crime pursuant to Federal Rule of Evidence 404(b). However, according to the major treatise on the Federal Rules of Evidence and as expressly provided for in Federal Rule of Evidence 803(22), defense counsel was correct that the defense was entitled to bring out evidence of the pendency of an appeal of that very judgment.

> Rule 803(22) is consistent with Rule 609(e) in providing that the pendency of an appeal does not make evidence of the judgment of conviction inadmissible. This position rests on the assumption that legal proceedings are correct and, therefore, reliable. The fact that an appeal is pending may be shown for the jurors to evaluate as they wish.

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[4] That appeal has not yet been decided. The appeal in United States v. Mejia, et al., United States Court of Appeals for the Eleventh Circuit case number 91-6108 has tentatively been set for oral argument during the week of October 24, 1995.

> 4 *Weinstein's Evidence* § 803(22)[01] (Mathew Bender 1995) at page 803-413.

*See* Fed. R. Evid. 609(e).

In this case, the trial judge expressly instructed the jury that what an attorney says is not evidence in the case and that the jury was to make its determination only based on the evidence admitted during trial. Thus, defense counsel's question to the witness was not evidence that the prior conviction was being appealed.

Petitioner Lopez was deprived of the best evidence of the fact that an appeal was pending. That evidence was intended to undercut the awesome potential prejudice from the judgment of conviction. The trial judge was correct that this evidence could undercut the weight to be given to the judgment of conviction. That is exactly what opposing evidence seeks to do. That was exactly what Federal Rule of Evidence 803(22) expressly authorized. The trial judge was in error in ruling that the admission of potentially neutralizing evidence is confusing. By so ruling, the trial judge was making that judgment of conviction conclusive evidence of guilt. That jurist's ruling pursuant to Federal Rule of Evidence 403 runs counter to the express provision of Federal Rule of Evidence 803(22) authorizing admissibility of the pendency of an appeal of that judgment. Indeed, it is near impossible to reconcile the applicability of Rule 403 to the wording of Rule 803(22). What the trial judge did should not be permitted.

If this Court is to sanction the rule of automatic admissibility of collateral crime evidence in a drug prosecution or in any type of federal criminal prosecution, then a defendant should be able to respond when the

facts warrant. A criminal trial should not be a contest of a gladiator against an unarmed victim.

This question presented for review is of importance in that it gives this Court an opportunity to educate the legal community about the lawful means of countering the profusion of collateral crime testimony admitted to obtain a conviction. This overlooked area of the law is one of national significance.

### Question Three[5]

There is no dispute that this case was the result of the efforts of confidential informant Lenny Bagglio. Mr. Bagglio was never called as a witness at this trial. The Government relied almost exclusively on the testimony of Mr. Machado. Nevertheless, the prosecution sought to have Mr. Bagglio testify from outside the courtroom. The hearsay evidence that constituted Mr. Bagglio's testimony buttressed the Government's case in a way that Mr. Machado's testimony could not. Mr. Bagglio was not confrontable by Petitioner Lopez at Lopez' trial.

The first incident of elicitation of hearsay occurred during the testimony of the Government's critical witness, Mr. Machado. The Government elicited testimony that Mr. Bagglio's daughter told Machado that Petitioner Lopez told her father that he, Lopez, was looking for a

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[5] On direct appeal, this question was raised as two separate issues. For the purpose of conciseness and because they are related, those two issues are presented as one question for review by this Court.

pilot. Defense counsel objected on the ground that this was hearsay and that any statement from that particular informant was not admissible because that declarant was not a coconspirator, but rather a government agent.

Because the Government was the proponent of this evidence, the Government bore the burden of establishing a preliminary matter concerning the admissibility of this testimony. 12 Fed. Proc. L. Ed. *Evidence* § 33:35 (1988); *cf.* Fed. R. Evid. 104(b); *Daubert v. Merrell Dow Pharmaceuticals*, ___ U.S. ___, 113 S.Ct. 2786, 2796 n.10 (1993) (preliminary matters to admissibility should be established by a preponderance of proof). The prosecutor responded that it took the position that the confidential informant's daughter was an unindicted coconspirator – a matter that the Government never proved. The trial judge overruled this objection.

Machado was relating what Lori said to him about what Petitioner Lopez said to her father, the confidential informant. This is a classic example of hearsay within hearsay. In order to be admissible, Lori's statement to Machado *and* Lenny Bagglio's statement to Lori *and* Petitioner Lopez' statement to Lenny Bagglio must each be admissible. Fed. R. Evid. 805; *Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272 at 280 (5th Cir. 1991); *United States v. Pendas-Martinez*, 845 F.2d 938 at 942-943 (11th Cir. 1988); *United States v. De Peri*, 778 F.2d 963 at 976-977 (3d Cir. 1985).

For the coconspirator hearsay exception to apply, there must be evidence that a conspiracy existed at the time that the statement in question was made and that the defendant and the declarant were members of that

conspiracy. *Bourjaily v. United States*, 483 U.S. 171 at 175 (1987). Because Lenny Bagglio was an informant at the time that this statement was allegedly made to him by Mr. Lopez and because there was no evidence elicited that Mr. Lopez had dealt with anyone else concerning an effort to obtain cocaine at the time this statement allegedly was made, Lenny Bagglio's statement of what Lopez told him was not admissible coconspirator hearsay. *United States v. Mahkimetas*, 991 F.2d 379 at 382-383 (7th Cir. 1993) (noting that nine other circuits follow this rule); *United States v. Kelly*, 888 F.2d 732 at 740 (11th Cir. 1989). The same reasoning applies to Lenny's statement to Lori. Thus, the lower appellate court's unexplained affirmance places the decision in this case in conflict with that of every other opinion considering this issue.

The Government's evidence almost totally depended on how Mr. Machado's testimony was received by the jury. This inadmissible evidence suggested that Mr. Lopez was the organizer of this venture and that Machado was only an underling who was taking instruction from Mr. Lopez. Absent this evidence, all of the corroborating evidence from all sources other than Machado suggested that the big player in this case was Mr. Machado, with whom the Government entered a plea agreement. Because the Government's case was light of proof of Mr. Lopez' guilt and because any corroboration of Mr. Machado was significant, the admission of this evidence was harmful to Mr. Lopez.

The Government was able to elicit additional incriminating hearsay testimony relating incriminating evidence from absent witness Lenny Bagglio, the informant whose conduct initiated this investigation. For a second time,

albeit in a different manner, the prosecution sought to have Mr. Bagglio testify from outside the courtroom.

Customs Service Special Agent Davis was the federal agent, whose efforts began this investigation. Over objection, Agent Davis was permitted to testify that "[b]ased on conversations with the individual known to me as Lenny, I initiated investigation into smuggling of cocaine into the United States by an individual by the name of Ramon Lopez."

That testimony was inadmissible hearsay. *Hutchins v. Wainwright*, 715 F.2d 512 at 514-516 (11th Cir. 1983); *United States v. Gomez*, 529 F.2d 412 at 416-417 (5th Cir. 1976); *United States v. Rodriguez*, 524 F.2d 485 at 486-487 (5th Cir. 1976).

The Government suggested in its brief on direct appeal that this was non-hearsay, elicited merely to show why the Government initiated its investigation. That response is a hollow one. Why the Government began this investigation was not made an issue. The witness from whom the Government elicited this testimony was one of the last witnesses who testified for the Government. The reason for initiating this investigation – if ever a valid response in the abstract – was irrelevant to this prosecution.

The harmfulness of this evidence is the same as that already discussed regarding the other hearsay evidence supposedly from the lips of Lenny Bagglio. Indeed, elicitation of this testimony doubles the harm, because is reinforces the hearsay from Lenny that Petitioner Lopez was the person, who sought to possess the cocaine that

Lenny and the other government agents ultimately brought into Florida.

The hearsay rule is an important protection for both civil and criminal litigants. The reasoning behind this rule is well-settled. *Chambers v. Mississippi*, 410 U.S. 284 at 298 (1973). The factual background of Petitioner Lopez' case makes it worthy of review to permit this Court to expound on the basic principles of evidentiary law presented. The legal reasoning applicable to this issue is addressed daily in every federal trial throughout this Country.

## CONCLUSION

For the above-stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX

Page

Opinion of The Lower Appellate Court .....App. 1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 93-5237
Non-Argument Calendar

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D.C. Docket No. 91-317-CR-UUB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON LOPEZ,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Florida

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(April 24, 1995)

Before KRAVITCH and EDMONDSON, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

In April 1991, Ramon Lopez ("Appellant") was indicted by a federal grand jury, charging him with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C.A. § 846 (west Supp. 1994), and possession with intent to distribute cocaine, in violation of 21 U.S.C.A. § 841(a)(1) (West 1981). At the conclusion of a jury trial, Appellant was convicted on both counts. The district court sentenced Appellant to concurrent terms of life imprisonment, to be followed by a term of five years' supervised release. Pursuant to 18 U.S.C.A. § 3147 (West Supp. 1994), the district court sentenced Appellant to an additional six months' imprisonment to run consecutively with the life sentences.

Appellant appeals his conviction and sentence, contending that (1) the district court abused its discretion in admitting evidence of Appellant's prior drug conviction, (2) the district court abused its discretion in refusing to admit evidence of Appellant's notice of appeal to that prior drug conviction, (3) the district court abused its discretion in admitting hearsay testimony regarding a prior statement by Appellant, (4) the district court abused its discretion in admitting testimony from a law enforcement officer concerning the commencement of his investigation, and 5) the district court erroneously relied on information in his presentence report stating that he was under investigation for homicide. After review of the record, we conclude that Appellant's claims are without merit.

AFFIRMED.